(18)

No. 89-1905

In The

Supreme Court of the United States

October Term, 1990

WISCONSIN PUBLIC INTERVENOR and
TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

AMICI CURIAE BRIEF OF STATES OF CALIFORNIA, ARIZONA, INDIANA, MARYLAND, NEW JERSEY AND WASHINGTON SUPPORTING RESPONDENTS

DANIEL E. LUNGREN
Attorney General for the
State of California
RODERICK E. WALSTON*
Chief Assistant Attorney
General
R. H. CONNETT
Assistant Attorney General
CHARLES W. GETZ III
Deputy Attorney General
1515 K Street, Sixth Floor
Sacramento, California 94244
(916) 324-5433

*Counsel of Record

(Additional Counsel Listed on Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATE OF ARIZONA
GRANT WOODS
Attorney General for State of Arizona
1275 West Washington
Phoenix, Arizona 85007

STATE OF INDIANA
LINLEY E. PEARSON
Attorney General for State of Indiana
219 State House
Indianapolis, Indiana 46204

STATE OF MARYLAND
J. JOSEPH CURRAN, Jr.
Attorney General for State of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

STATE OF NEW JERSEY
ROBERT J. DEL TUFO
Attorney General for State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

STATE OF WASHINGTON
KENNETH O. EIKENBERRY
Attorney General for State of Washington
Highways Licenses Building
7th Floor – PB 71
Olympia, Washington 98504

QUESTION PRESENTED

Whether the Federal Insecticide, Fungicide and Rodenticide Act preempts local regulation of pesticide use?

STATEMENT OF PARTIES

The amici States of California, *et al.*, adopt the Statement of Parties of the respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 89-1905

In The

Supreme Court of the United States

October Term, 1990

WISCONSIN PUBLIC INTERVENOR and
TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

AMICI CURIAE BRIEF OF STATES OF CALIFORNIA, ARIZONA, INDIANA, MARYLAND, NEW JERSEY AND WASHINGTON SUPPORTING RESPONDENTS

INTEREST OF AMICI CURIAE

The amici States of California, *et al.*, have an interest in the question whether federal law authorizes local governments to regulate use of pesticides. Pesticides are vital in the production of many agricultural products, but their use creates potential risks to the human environment. The amici states have highly developed agricultural economies, and represent their citizens in matters affecting the human environment. Therefore, the amici states have an interest in the question presented here. Indeed, amici State of California has the largest agricultural economy, and also the largest number

of human resources, of any state in the nation. In the amici states' view, the Federal Insecticide, Fungicide and Rodenticide Act authorizes the states to regulate pesticide use, but precludes local governments from regulating use; the Act does not, however, preclude the states from delegating authority to local governments to administer the state's own regulatory program. This amici brief sets forth these views in greater detail for the Court's consideration.

STATEMENT OF THE CASE

The amici states adopt the Statement of the Case contained in the respondent's brief.

SUMMARY OF ARGUMENT

Section 24(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) specifically authorizes the states to regulate pesticide use, but does not provide similar authority to local agencies of government. In other FIFRA provisions, Congress specifically distinguished between state and local governments with respect to their respective authority under FIFRA. Congress' failure to authorize local regulation of pesticide use in section 24(a) – in light of the fact that Congress specifically distinguished between state and local authority in other provisions – indicates that Congress meant to preclude local regulation of use. This conclusion is also supported by section 24(c), which authorizes the states to register pesticides for special uses in order to serve "special local needs;" this provision indicates that Congress intended that the states would act on behalf of local police power interests and that local action itself was not authorized. The conclusion that local regulation is preempted is also supported by the legislative history of section 24(a), for the report of the congressional committee that drafted the provision stated that the provision precludes local regulation of pesticide use. Indeed, Congress rejected a proposed amendment by another congressional committee that would have specifically authorized local regulation. The congressional

purpose underlying section 24(a) was to preclude local governments from imposing excessive burdens on interstate commerce by adopting different pesticide use standards within the same state.

Although Congress precluded local governments from independently regulating pesticide use, Congress did not preempt the states from delegating authority to local governments to administer the state's own regulatory program. If the state delegates such authority, the program is a *state* program and thus is permissible under the specific language of section 24(a). The congressional purpose of precluding local governments from adopting different standards within the same state is unaffected where the state delegates authority to local governments to administer the state's own program. In the instant case, Wisconsin did not delegate specific authority to the local government to administer the State's regulatory program, and the local ordinance was not adopted pursuant to any such specific delegation of authority. Therefore, the ordinance contravenes the statutory language and congressional purposes of FIFRA and is preempted.

ARGUMENT

I. THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT PREEMPTS INDEPENDENT LOCAL REGULATION OF PESTICIDE USE.

A. The Preemption Doctrine

In exercising its powers under Article I of the Constitution, Congress has the power, within constitutional limits, to preempt state and local laws. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 203-204 (1983). Congress may exercise its preemption authority by an explicit statement to that effect. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of an explicit statement, Congress' preemptive intent may be implied in two different ways. First, Congress may wholly "occupy the field" of the state or local regulation, thus leaving "no room" for the

adoption of supplementary state or local laws. *Rice*, 331 U.S. at 230; *Pacific Gas & Electric*, 461 U.S. at 203-204. Second, even if Congress has not occupied the field, state and local regulation may be preempted if such regulation "conflicts" with federal law, assuming that Congress has not chosen to tolerate such conflicts. *Pacific Gas & Electric*, 461 U.S. at 204; *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). Such conflicts may arise where compliance with both federal and state law is a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), or where state or local laws stand as an "obstacle" to the accomplishment of Congress' purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This Court has established important guideposts in determining whether Congress has impliedly preempted state or local regulation. First, when Congress legislates in a field traditionally occupied by the States, the Court starts with " 'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.' " *California v. ARC America Corp.*, 490 U.S. ___, 109 S.Ct. 1661, 1665 (1989) (emphasis added), quoting from *Rice*, 331 U.S. at 230; see *California v. Federal Energy Regulatory Comm'n*, ___ U.S. ___, 110 S.Ct. 2024, 2029 (1990); *Florida Lime & Avocado Growers*, 373 U.S. at 142 (no preemption unless Congress "has unmistakably so ordained"); *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 414 (1973) (no preemption in absence of "clear manifestation of [congressional] intention"). As this Court has stated, there is a "presumption against finding preemption of state law in areas traditionally regulated by the States." *ARC America*, 109 S.Ct. at 1665, quoting from *Rice*, 331 U.S. at 230. "This assumption provides assurance that 'the federal-state balance [citation omitted] will not be disturbed unintentionally by Congress or unnecessarily by the Courts.' " *Jones*, 430 U.S. at 525. Additionally, this Court has held that "the regulation of health and safety matters is primarily, and historically, a

matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 714, 720 (1985). These guideposts are relevant here because the local ordinance in this case seeks to regulate the use of pesticides, a matter that has been traditionally regulated by state and local governments and that affects the public health and safety.

Additionally, the fact that Congress has adopted a comprehensive scheme of regulation does not, in itself, support the conclusion that Congress intends to preempt state and local regulation on the same subject. *Hillsborough County*, 471 U.S. at 718-719. "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *Hillsborough County*, 471 U.S. at 718, quoting from *Dublino*, 413 U.S. at 415. To infer preemption simply because Congress has established a comprehensive regulatory scheme "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County*, 471 U.S. at 718. The comprehensiveness of the federal scheme is even less probative where, as in this case, the local regulation relates to the public health or safety. "Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Hillsborough County*, 471 U.S. at 719. Therefore, the comprehensiveness of the federal regulatory scheme in this case does not necessitate the conclusion that the local ordinance is preempted.

This Court has held that preemption of local ordinances is analyzed in the same way as preemption of state laws. *Hillsborough County*, 471 U.S. at 713-713. Still, local governments generally are not entitled to the same deference within our federal system as the states, see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978) ("Cities are not themselves sovereign; they do not receive all

the federal deference of the States that create them"),[1] which suggests that the presumptions against preemption apply with less force where local laws are concerned. This conclusion is particularly appropriate where, as in this case, Congress has specifically authorized *state* regulation and the question is whether Congress has preempted *local* regulation. In such cases, the states – which generally are more responsive and accountable to local interests than the federal government – are capable of acting on behalf of local interests, and thus the consequences of federal preemption on local interests are considerably less than in cases where state action itself is preempted. In such cases, the presumptions against preemption lose much of their force.

As we now explain, we believe that Congress intended to authorize regulation of pesticide use only at the national and state levels, and thus to preclude local regulation. This conclusion is supported by the statutory language of the Federal Insecticide, Fungicide and Rodenticide Act, by its legislative history, and by its underlying congressional purposes. Therefore, the local ordinance in this case impermissibly intrudes into domains reserved to the national and state governments and thus is preempted.[2]

---

[1] For instance, local governments do not possess the sovereign immunity held by the states under the Eleventh Amendment of the U. S. Constitution. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1974). On the other hand, local governments are equated with states for purposes of other constitutional provisions restricting state action. *Waller v. Florida*, 397 U.S. 387 (1970) (Double Jeopardy Clause); *Avery v. Midland County*, 390 U.S. 474, 480 (1968) (Fourteenth Amendment); *Trenton v. New Jersey*, 262 U.S. 182, 185-186 (1923) (Contract Clause).

[2] In addition to the Wisconsin Supreme Court decision under review here, the Sixth Circuit Court of Appeals and a federal district court have held that FIFRA preempts local regulation of pesticide use. *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990); *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109 (D.Md. 1986). The California Supreme Court and the Maine Supreme

(Continued on following page)

B. The Federal Insecticide, Fungicide and Rodenticide Act

1. Statutory Language

In 1947, Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which in its original form provided for licensing and labeling of pesticides. 61 Stat. 163 (1947); *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 990 (1984). In response to growing public concerns about the safety of pesticides and their effect on the environment, President Nixon in 1971 proposed legislation to develop a comprehensive regulatory program governing pesticide sale and use.[3] Following the President's initiative, Congress in the

---

(Continued from previous page)

Judicial Court, on the other hand, have taken the opposite view. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150 (1984); *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).

Additionally, the Attorneys General of several states have issued opinions declaring that FIFRA preempts local regulation of pesticide use. 41 Op. Atty. Gen. Ore. 21 (1980) (Oregon); 1990 Op. Atty. Gen. Iowa 90-6-3 (1990) (Iowa); 1989 Op. Atty. Gen. Ark. 89-212 (1989) (Arkansas); 1976-77 Op. Atty. Gen. La. 324 (1978) (Louisiana); 1988 Op. Atty. Gen. Md. 88-006 (1988) (Maryland); 70 Op. Atty. Gen. Md. 161 (1985) (same).

[3] According to President Nixon:

> "Pesticides have provided important benefits by protecting man from disease and increasing his ability to produce food and fiber. However, the use and misuse of pesticides has become one of the major concerns of all who are interested in a better environment. . . . The challenge is to institute the necessary mechanisms to prevent pesticides from harming human health and the environment. [¶] Currently, Federal controls over pesticides consist of the registration and labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act. The administrative processes contained in the law are inordinately cumbersome and time consuming, and there is no authority to deal with the actual use of

(Continued on following page)

following year adopted sweeping amendments that completely revised FIFRA, transforming the statute from a licensing and labeling law into a comprehensive regulatory scheme. 7 U.S.C. §§ 136 *et seq.*; *Ruckelhaus*, 467 U.S. at 987. The amendments provide that the Environmental Protection Agency (EPA) must register pesticides that are sold or otherwise distributed, 7 U.S.C. § 136a(a); that the EPA must classify each pesticide for general use or restricted use, *id.* at § 136a(d); that the EPA must register facilities that produce pesticides, *id.* at § 136e; and that each state may adopt a plan, subject to EPA approval, for certification of applicators of restricted use pesticides, *id.* at § 136b. The purpose of the amendments was to achieve a "more complete regulation of pesticides in order to provide for the protection and man and his environment and the enhancement of the beauty of the world around him." S. Rep. No. 92-838, 92d Cong., 2d Sess. 3 (1972).

The 1972 amendments expressly authorize the states to regulate pesticide use under specified circumstances. Under section 24(a), a "State" may regulate the sale or use of an EPA-registered pesticide, except that the state may not authorize uses prohibited by EPA. 7 U.S.C. § 136v(a). Additionally, under section 24(c), a "State" may register pesticides for additional uses within the "State" to meet "special local needs," except that the State may not register pesticides for uses denied by the EPA. *Id.* at § 136v(c). Under section 2, a "State" is defined as "a State," the District of Columbia, and certain enumerated territories. *Id.* at § 136(aa). The definition of "State" notably does not mention local agencies of government. Therefore, sections 24(a) and 24(c), on their face, authorize the *states* to regulate pesticide use under specified

(Continued from previous page)

pesticides. The labels approved under the Act specify the uses to which pesticide may be put, but there is no way to insure that the label will be read or obeyed. The comprehensive strengthening of our pesticide control laws is needed." S. Rep. No. 92-970, 92d Cong., 2d Sess. 9 (1972).

circumstances, but do not authorize such regulation by local governments. The clear inference is that Congress intended to authorize regulation only at the national and state levels, not the local level. Congress apparently intended to achieve uniform national or statewide standards, and to preclude local governments from adopting different standards within the same state.[4]

The conclusion that local governments are not included within the definition of "State" for purposes of regulating pesticide use is strengthened by other provisions of FIFRA, some of which authorize the "State" to perform certain functions and others of which authorize both the "State" and a "political subdivision" to perform certain functions. These provisions indicate that Congress purposefully differentiated between state and local authority; thus, by authorizing only a "State" to regulate pesticide use, Congress purposefully precluded local regulation. Turning first to provisions authorizing "State" action, a "State" is authorized to develop a plan for certification of applicators of restricted use pesticides, if the plan is submitted by the "Governor of such State" and approved by the EPA. 7 U.S.C. § 136i(a)(2). Since local

[4] The petitioners and amicus United States argue that a local government must be a "State" for purposes of section 24(a), or otherwise section 24(b), in preempting a "State" from regulating labeling, would anomalously fail to preempt local regulation of labeling. This argument misconstrues the context of section 24. Section 24 specifically defines only the authority, and limitations thereon, of a "State" under FIFRA. The provision does not specifically define the authority, or limitations thereon, of local agencies. The limitations on local authority are not derived from the specific language of section 24, but rather from the fact that certain authority is delegated to the "State" and thus is inferentially withheld from local governments. Accordingly, the conclusion that local governments are preempted from regulating pesticide use is drawn from the fact that the "State" is specifically authorized to regulate such use and local governments are not. Similarly, section 24(b), in precluding state regulation of labeling, evinces a congressional design to occupy the field of labeling regulation, thus indicating that local labeling regulation is preempted.

governments do not have "Governors," this provision clearly indicates that the state itself must develop the plan, not local governments. Additionally, the EPA may enter into agreements with "States" that allow the "State" to implement cooperative enforcement programs; may train "State" personnel to operate such programs; and may assist "States" in implementing cooperative programs through grants-in-aid and in developing and administering "State" programs. *Id.* at § 136u(a). Each "State" has primary enforcement authority for pesticide use violations within its jurisdiction, if the EPA determines that the "State" has adequate laws regulating pesticide use. *Id.* at § 136w-1(a). The EPA is required to refer complaints of pesticide use violations to the "State" for appropriate enforcement action. *Id.* at § 136w-2(a). These provisions clearly contemplate action by the state itself, not by local governments.

In contrast to the above provisions, other FIFRA provisions specifically authorize action by *both* state and local governments. The EPA, and "any State or political subdivision" designated by the EPA, have authority to inspect books and records for possible pesticide use violations. *Id.* at § 136f(b). The EPA, "in cooperation with other Federal, State or local agencies," must establish a national plan for monitoring pesticides. *Id.* at § 136r(b). The EPA must cooperate with federal agencies and "any appropriate agency of any State or any political subdivision thereof" in administering FIFRA and in securing uniformity of regulations. *Id.* at § 136t(b).[5] Since

[5] The dissenting opinion below argued that the EPA's obligation to cooperate with local governments in achieving uniformity of regulations would be "meaningless" if local governments lacked authority to adopt regulations governing pesticide use. 452 N.W.2d at 568 (Steinmetz, J., dissenting). As noted above, however, the states have authority to register pesticides for additional uses in order to serve special local needs, 7 U.S.C. § 136v(c), and the states would presumably consult with local governments before registering pesticides for special local uses. Since local governments would normally be consulted in this process, Congress understandably sought to ensure that local governments are also consulted

(Continued on following page)

Congress specifically authorized both state and local governments to exercise such authority, Congress' failure to authorize local governments to regulate pesticide use – in a statutory provision specifically authorizing state regulation of use – demonstrates a reasonably clear congressional purpose to preclude local regulation of use.

The conclusion that Congress intended to preempt local regulation of use is supported by other statutory provisions as well. As noted above, section 24(c) authorizes a "State" to register pesticides for special uses within the "State" in order to serve "special local needs." 7 U.S.C. § 136v(c). Thus, Congress intended that the states would act on behalf of local governments with respect to pesticide uses affecting local interests. In this way, Congress accommodated the need to protect local interests and at the same time minimized the extent to which parochial local concerns will interfere with statewide uniformity of standards. It would be incongruous for Congress to authorize the states to act on behalf of local governments in authorizing pesticide uses for local needs, and on the other hand to authorize local governments to independently regulate pesticide use. Indeed, under such a scheme, local governments presumably would have authority to prohibit uses authorized by the state for "special local needs," thus creating an internal conflict within the congressional scheme. Nor can it be argued that local governments are the "State" for purposes of section 24(c), for the provision specifically differentiates between "State" authority to act and "local" interests to be protected, thus indicating a statutory dichotomy between "State" and "local" authority and interests. Thus, Congress plainly indicated that authorizations for special local uses must be made at the state level rather than

(Continued from previous page)

before the EPA adopts uniform national standards. The fact that local governments must be consulted on matters that may be of importance to them does not indicate that Congress intended to authorize direct local regulation of pesticide use, particularly since Congress authorized the states to register pesticides for uses necessary to serve special local needs.

the local level, which supports the view that Congress similarly intended to authorize regulation of use at the state level rather than the local level.

Additionally, as noted earlier, section 26 authorizes each state to exercise "primary enforcement responsibility" for pesticide use violations, if the EPA determines that the state has adopted adequate laws regulating pesticide use. 7 U.S.C. § 136w-1(a). Congress thus provided a mechanism for the states to obtain federal approval of their enforcement programs, and authorized the states to assume control of enforcement if such approval is obtained. Congress did not, however, provide a similar mechanism for local governments to obtain approval of local enforcement programs, or to otherwise assume control of enforcement. Thus, Congress clearly indicated that enforcement authority must be exercised only by the EPA and the states, not by local governments. Since Congress withheld enforcement authority from local governments, it plainly withheld regulatory authority as well.

The United States argues in its amicus brief that the reference to "State" in section 24(a) necessarily includes local governments, since local governments are political subdivisions of the state. U.S. Br. 12. To be sure, local governments are political subdivisions of the state, in that the state delegates authority to them and their laws are part of the body of state law. *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285 287 (1883); *County of Los Angeles v. Riley*, 6 Cal.2d 621, 627, 59 P.2d 139, 141 (1936); *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909 (1906); Restatement of Conflicts, § 2b. As explained above, however, other statutory provisions indicate that Congress, by authorizing only "State" regulation of pesticide use in section 24(a), and by defining a "State" as not including local governments, intended to preclude local regulation of use. Since Congress purposefully precluded local regulation, the relationship of local governments to the state government is of little relevance. Indeed, if the reference to "State" in section 24(a) were construed as including local governments, Congress apparently would have specifically authorized local governments to regulate pesticide use; in that event, the states would be unable to

preempt or otherwise restrict local regulation, because the states presumably cannot deny authority to local governments that Congress has expressly granted. Thus, the United States' argument may have the unintended consequence of restricting the states' own distribution of authority between state and local governments.

In summary, the statutory language indicates with reasonable clarity that Congress intended to achieve national or statewide uniformity of standards relating to pesticide use, and to avoid dissimilar local standards. Congress wanted a minimum of one national standard or a maximum of fifty state standards, and no more. Congress evidently believed that, because pesticide use creates problems of national and statewide significance, regulation of use should be concentrated at the national and state level. In Congress' view, the states are capable of acting on behalf of local police power interests, and thus there is no basis for authorizing regulation beyond the state level.

2. Legislative History

The legislative history removes any doubt that Congress intended to preempt local regulation of pesticide use. As noted earlier, President Nixon in 1971 submitted proposed legislation that became the basis of the FIFRA amendments. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 12 (1971). The President's proposed bill included a provision authorizing both state and local regulation of pesticide use; the provision stated that "nothing in this Act shall be construed as limiting the authority of a State *or political subdivision thereof* to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of this Act." *Maryland Pest Control Ass'n v. Montgomery County*, 646 F.Supp. 109, 111-112 (D. Md. 1986) (emphasis added). On February 10, 1971, the President's proposed bill was introduced in the House of Representatives as H.R. 4152. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 12 (1971). The House Agricultural Committee, after holding several hearings, reported

out a new bill, H.R. 10729. *Id.* The bill rejected President Nixon's proposed language authorizing local regulation of use, and instead contained a provision, section 24(a), that is identical to section 24(a) in its present form. *Id.* at 64. The Committee report described the provision, stating that:

> "The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." *Id.* at 16.

Thus, the House Agricultural Committee bill preempted local regulation of pesticide use.

The bill was referred to the Senate Committee on Agriculture and Forestry. On June 7, 1972, the Senate Committee issued a report stating that it had "considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives." S. Rep. No. 92-838, 92d Cong., 1st Sess. 16 (1972). The report also stated that:

> "Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting each such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at 16-17.

Thus, the Senate Committee report clearly indicated that section 24 precluded local regulation of pesticide use.

The bill was then referred to the Senate Commerce Committee. That committee proposed to amend section 24 by

adding the words "or local government" after the word "State," an amendment that would have specifically authorized local regulation of pesticide use. S. Rep. No. 92-970, 92d Cong., 2d Sess. 6 (1972). The Senate Commerce Committee report described the amendment's effect, stating that:

> "The amendment gives local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by States or Federal authorities. [¶] While the Agricultural Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA." *Id.* at 27.

Subsequently, the Senate Committee on Agriculture and Forestry issued a summary of comments concerning the Senate Commerce Committee's proposed amendments. In the comments, the former Committee objected to the latter Committee's proposed amendment authorizing local regulation of pesticide use, stating that:

> "This [Senate Commerce Committee] amendment would permit local governments in addition to the Federal and State governments to regulate the sale or use of a pesticide. The Committee on Agriculture and Forestry felt that regulation by the Federal Government and the 50 States should be sufficient and should preempt the field." 1972 U.S. Code Cong. & Admin. News 4026. See also *id.* at 4066.

Thereafter, the Senate Agriculture and Forestry Committee and the Senate Commerce Committee conferred and drafted a compromise substitute bill that reconciled many differences between the bills, but that pointedly did not include the Commerce Committee's proposed amendment authorizing local regulation of pesticide use.

The compromise bill was then debated before the full Senate. During the debate, the Senate Commerce Committee amendment, which proposed to authorize local regulation, was submitted to and considered by the full Senate. 118 Cong. Rec. 32251, 92d Cong., 2d Sess. (1972). Senator Talmadge, Chairman of the Committee on Agriculture and Forestry, and Senator Allen, Chairman of the Subcommittee on Agricultural Research and General Legislation, offered as a substitute the language of the compromise bill adopted by those committees, which did not include the proposed amendment. *Id.* at 32251-32253, 32260. Senator Allen argued that the Senate should adopt the language of the compromise bill rather than the Commerce Committee version, stating that:

> "[FIFRA] should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at 32256.

The Senate then rejected the Commerce Committee amendment that would have authorized local regulation of use. *Id.* at 32258. The Senate subsequently passed the compromise version of H.R. 10729. *Id.* at 32263.

Thereafter, a Conference Committee was selected to resolve differences between the Senate and House versions of the bill. The Conference Committee report did not address the specific meaning of section 24(a), see H.R. Rep. No. 92-1540, 92d Cong., 2d Sess. 30-34 (1972), apparently because the Committee understood that the provision meant exactly what its originator – the House Agricultural Committee – had said it meant, namely that local regulation is precluded. If, as contended by the petitioner, Congress did not intend to adopt the House Agricultural Committee's interpretation of its own provision, the Conference Committee necessarily would have addressed and resolved the differing interpretations. The Conference Committee's silence strongly indicates acquiescence in the House Agricultural Committee's interpretation.

In summary, Congress adopted the statutory language proposed by the House Agricultural Committee, presumably understanding, as the report of the House Agricultural Committee indicated, that the language precludes local regulation

of use. Congress specifically rejected the amendment proposed by the Senate Commerce Committee that would have had the opposite effect. As a general rule of statutory construction, the meaning ascribed to statutory language by the committee that proposes the language is entitled to substantial deference, particularly where Congress rejects proposed language that would have an opposite effect. Thus, the legislative history strengthens the conclusion that section 24(a) preempts local regulation.

The United States argues in its amicus brief that Congress remained "silent" on the issue of local preemption, and that Congress, "agree[ing] to disagree," reached a compromise under which each state is authorized to decide for itself whether to allow local regulation. U.S. Br. 9, 18-19. If Congress had reached such a compromise, the compromise would not have been unreasonable. The statutory language and legislative history, however, are devoid of any suggestion that Congress reached such a compromise. To the contrary, the statutory language, in authorizing a "State" to regulate pesticide use, is capable of only one of two meanings: Either local governments are included within the definition of "State" and thus can regulate pesticide use, or local governments are not included and thus cannot regulate. There is no room in the statutory language for the third meaning suggested by the United States, *i.e.*, that as a matter of federal law the choice belongs to the states. Moreover, the United States' argument is inconsistent with the legislative history of FIFRA, which as indicated above indicates that Congress adopted the statutory language proposed by the House Agricultural Committee that was understood to preempt local regulation. Thus, Congress did not remain silent, but instead indicated with reasonable clarity that local regulation is prohibited. As we explain later, we believe that Congress did not preclude the states from delegating authority to local governments to administer the state's own regulatory program, a conclusion that is supported both by the statutory language and congressional purposes of FIFRA. Congress did not, however, authorize the states to decline to adopt a regulatory

program and simply convey regulatory authority to local governments, as argued by the United States.[6]

3. Congressional Purpose

According to the legislative history, the congressional purpose underlying section 24(a) was to preclude local governments from imposing excessive burdens on interstate commerce, as would be the case if each unit of local government were authorized to adopt its own system of regulation. S. Rep. No. 92-838, 92d Cong., 1st Sess. 16-17 (1972) (local regulation would result in an "extreme burden on interstate commerce"). Thus, Congress was willing to tolerate some interstate commerce burdens, in that regulation might vary from state to state, but was unwilling to tolerate the excessive burdens that would result if individual cities and counties were authorized to adopt their own regulatory systems. The petitioners' argument would obstruct this congressional purpose by authorizing local governments to adopt different, potentially conflicting systems of regulation, thus creating a

[6] The United States relies on the analysis of the California Supreme Court in *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150 (1984), which held that Congress authorized each state to determine whether to authorize local regulation. As explained above, we believe that the *County of Mendocino* decision is not supported by the statutory language and legislative history of FIFRA. Indeed, the decision cannot be reconciled with the fact that Congress specifically adopted the statutory language proposed by the House Agricultural Committee – which stated that the language precluded local regulation – and rejected the language proposed by the Senate Commerce Committee that would have had the opposite effect. The dissenting opinion in *County of Mendocino* persuasively argued that "[s]ince the compromise bill adopted the Agricultural and Forestry Committee's version without change, ordinary principles of statutory construction suggest that the provisions should be interpreted in light of the intent expressed in that committee's report." 36 Cal.3d at 499 (Kaus, J., dissenting). We believe that the dissenting opinion is correct, although, as we explain later, we believe that Congress did not preclude the states from delegating authority to local government to administer the state's own regulatory program.

checkerboard pattern of regulation within each state. This argument would create potentially conflicting regulation with respect to agricultural or other areas that lie partially within the jurisdiction of different counties. Indeed, this argument would create conflicting regulation as to the *identical* area in some instances, as where a city – which is a form of local government – adopts different regulations than the county in which it is located. If local governments were authorized to regulate pesticide use, local governments might be able to prevent the state itself from applying pesticides to eradicate a pest infestation within the local jurisdiction, as several local governments sought to do during the 1990 Mediterranean fruit fly crisis in California;[7] the practical effect of such local regulation would be to allow the infestation to spread to areas outside the local jurisdiction and thus require the application of greater amounts of pesticides to eradicate the pest. Congress sought to avoid these consequences, and the resulting excessive impacts on interstate commerce, by authorizing regulation exclusively at the state level.

The United States argues in its amicus brief that regulation of use, unlike regulation of labeling, does not affect interstate commerce. U.S. Br. 22-23. To the contrary, the report of the Senate Commerce on Agriculture and Forestry stated that local regulation would cause an "extreme burden on interstate commerce." S. Rep. No. 92-838, 92d Cong., 1st Sess. 16-17 (1972). For example, the California agricultural industry extensively uses pesticides in the production of fruits and vegetables, and the California agricultural industry provides the nation with approximately one-half of the national supply of fruits and vegetables. If local governments were

[7] During the 1990 Mediterranean fruit fly infestation in southern California, several cities and counties adopted ordinances under state law theories that sought to preclude California from aerially spraying Malathion within the jurisdiction of the cities and counties. *California v. City of Pasadena, et al.*, No. C-755032, Superior Court for Los Angeles County; *California v. City of Fullerton*, No. 625496, Superior Court for Orange County; *California v. City of Los Angeles*, No. BS002736, Superior Court for Los Angeles County.

authorized to prohibit the use of pesticides on fruits and vegetables in California, such local regulation may reduce the amount of fruits and vegetables that could be shipped from California to other states, thus causing a substantial adverse effect on interstate commerce. Indeed, during California's 1981 Mediterranean fruit fly crisis, several states unsuccessfully sought to impose embargoes against the importation of California fruits and vegetables,[8] and the infestation was subsequently eliminated by aerial application of the pesticide Malathion. In short, the use of a pesticide was necessary to produce uninfested agricultural products that were widely distributed in interstate commerce. Therefore, the United States' argument that regulation of pesticide use does not affect interstate commerce is demonstrably incorrect.

The United States also argues that local regulation is consistent with the congressional purposes underlying FIFRA because local governments have the resources and capability of tailoring pesticide use to local circumstances. U.S. Br. 22-23. To the contrary, FIFRA specifically authorizes the *states* to register uses for "special local needs," 7 U.S.C. § 136v(c), thus indicating that the states – not local governments – are authorized to tailor pesticide use to local circumstances. The United States makes no reference to this statutory provision in its amicus brief.

II. CONGRESS DID NOT PRECLUDE THE STATES FROM DELEGATING AUTHORITY TO LOCAL GOVERNMENTS TO ADMINISTER THE STATE'S OWN REGULATORY PROGRAM.

The fact that Congress preempted local governments from regulating pesticide use does not necessarily mean that Congress preempted the states' authority to delegate authority to local governments to administer the state's own regulatory program. As this Court has noted, "Municipal corporations

---

[8] This Court issued a temporary restraining order enjoining the embargoes. See *California v. Texas*, No. 87 Original (1980 Term); see also *California v. Texas, et al.*, No. 90 Original (1980 Term).

are instrumentalities of the State for the convenient administration of government within their limits." *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883). Accordingly, the states generally are free to delegate authority to local governments to act in furtherance of matters affecting local interests. *In re Isch*, 174 Cal. 180, 162 Pac. 1026 (1927); *City of Bakersfield v. Miller*, 64 Cal.2d 93, 410 P.2d 393 (1966); *Freeman v. Contra Costa County Water Dist.*, 18 Cal.App.3d 404, 95 Cal.Rptr. 852 (1971). We do not suggest that Congress is powerless to prohibit the states from delegating authority to local governments in instances where Congress has authorized action by the states themselves. To the contrary, if Congress has authority to preempt the states from adopting different standards, on grounds that such standards would result in unreasonable burdens on interstate commerce, *a fortiori*, Congress has authority to preempt local governments from adopting different standards within each state, on grounds that such local standards would result in even greater interstate commerce burdens. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (holding that Congress has granted antitrust immunity to states, but not to local governments on same terms). In our view, Congress can properly authorize regulation at the state level – and thus tolerate the interstate commerce impacts caused by such regulation – but preclude local regulation in order to avoid substantially greater impacts. In other words, Congress can impose reasonable conditions on its grant of regulatory authority to the states; one such condition would be that the states cannot convey their regulatory authority to local governments, since the conveyance would result in excessive interstate commerce burdens that Congress has the right to prevent. Cf. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 771-775 (1982).

To be sure, the Tenth Amendment of the U. S. Constitution, which reserves to the states powers not delegated to the federal government, may limit the extent to which Congress can permissibly restrict distribution of legislative power within the state. Cf. *National League of Cities v. Usery*, 426

U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In our view, the Tenth Amendment does preclude Congress from restricting such distribution of power where the state – having the right under federal law to establish its own regulatory program – establishes such a program and delegates authority to local governments to administer the program. In this situation, the state is simply providing for administration of its own program, consistently with the congressional purpose of avoiding dissimilar local regulation; the delegation of authority by the state does not cause any additional burdens on interstate commerce, and thus the balance of national and state interests weighs heavily in favor of the state delegation of authority. On the other hand, the Tenth Amendment does not, we believe, preclude Congress from restricting distribution of legislative power where the state does *not* establish its own regulatory program, and instead transfers its regulatory authority to local governments. In this situation, the program being administered is a local one, and the administration of all such local programs may result in dissimilarity of standards within each state; this result may cause potentially greater impacts on interstate commerce, and thus the balance of national and state interests tips in favor of the national interest. Therefore, although we agree with the argument of the amici States of Hawaii, *et al.*, that the Tenth Amendment imposes *some* constraints on congressional actions affecting distributions of legislative power within the state, we believe that their argument goes too far in asserting that the Tenth Amendment constrains *all* congressional actions affecting such distributions. See Am. Cur. Br. of Hawaii, *et al.*, 12. In our view, the Tenth Amendment constrains congressional action where the state delegates authority to local governments to administer the state's own regulatory program, but not where the state fails to adopt a regulatory program and instead transfers its regulatory authority to local governments.

Apart from the constitutional question, the statutory language and congressional purposes of FIFRA support the view that the states may delegate authority to local governments to administer the state's own regulatory program. If the state

delegates such administrative authority, the program administered by local authority is a "State" one and thus is permissable under the explicit language of section 24(a). As noted earlier, the congressional purpose of section 24(a) was to preclude local governments from adopting different standards within the same state; if a state delegates administrative authority to local governments, there can be no dissimilarity of local standards and thus no contravention of the congressional purpose. Because of the vast array of local resources and expertise, a state may properly decide to utilize local resources for administration purposes, consistently with the congressional goal of providing for comprehensive and effective state regulation of pesticide use. Therefore, such delegations of authority do not pose an "obstacle" to the congressional purpose, see *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and are not preempted.

To provide an example, a state may adopt a program governing pesticide use and authorize local governments to administer the program by adopting supplementary regulations and issuing permits, subject to the state's authority to review such local decisions and the state's retention of control over the program. Indeed, such a regulatory program exists in California, which has the largest agricultural industry of any state in the nation. In California, the California Department of Food and Agriculture (CDFA), through its Director, has primary responsibility for administering California's agricultural laws, including its pesticide laws. Cal. Food & Ag. Code §§ 101 *et seq.*, 14001 *et seq.* The Director has adopted extensive regulations providing for comprehensive regulation of pesticide use. 3 Cal. Code Reg. (C.C.R.) §§ 6000-6900.[9] The board of supervisors of each local government is authorized to hire a County Agricultural Commissioner with

---

[9] The Director's regulations provide for, *inter alia*, certification of pesticide programs, 3 C.C.R. §§ 6100 *et seq.*; inspection programs, *id.* at §§ 6140 *et seq.*; registration of pesticides, *id.* at §§ 6151 *et seq.*; permits for applicators, *id.* at §§ 6420 *et seq.*; licensing of pest control operators, *id.* at §§ 6520 *et seq.*; and prevention of pesticide groundwater contamination, *id.* at §§ 6800 *et seq.*

responsibility, *inter alia*, for local administration and enforcement of pesticide programs; the County Agricultural Commissioner, however, must be approved by the Director and is subject to the Director's oversight and review. Cal. Food & Ag. Code §§ 2101 *et seq.*, 2281. The County Agricultural Commissioner has authority to issue conditional permits authorizing pesticide use, but the permits are subject to the Director's review. *Id.* at §§ 14006.5, 14009. The County Agricultural Commissioner is authorized to adopt supplementary pesticide use regulations more restrictive than the Director's regulations, but the Commissioner's regulations are valid only if approved by the Director. *Id.* at § 11503. Thus, the Director is ultimately responsible for administration and enforcement of California's pesticide use laws, and has authority to review action by the County Agricultural Commissioner, who otherwise acts on behalf of local interests. In this way, the California program is a "State" program within the meaning of section 24(a) of FIFRA, and does not contravene the congressional purpose of precluding local governments from adopting dissimilar standards. Indeed, under the petitioner's view, local governments in California might argue that FIFRA – by authorizing local regulation of pesticide use – preempts California's authority to vest exclusive authority in the Director, a result that would diminish California's authority to provide its own distribution of regulatory authority between state and local governments.

On the other hand, the statutory language and congressional purposes of FIFRA do not support the view that the state can decline to adopt its own regulatory program and simply convey its regulatory authority to local governments. Otherwise, local governments would be able to adopt dissimilar regulatory standards, thus creating the excessive interstate commerce burdens that Congress sought to avoid. It is immaterial, with respect to the congressional purposes underlying FIFRA, that local governments may have authority under applicable principles of state law relating to distribution of power between state and local governments. The test is not whether local governments have authority under state law principles governing distribution of legislative power, or

whether the state has refrained from preempting local action. Rather, the test is whether the state has adopted a program regulating pesticide use and has delegated administrative authority to local governments. The latter test is consistent with the congressional purpose of avoiding excessive interstate commerce burdens, and the former is not. Therefore, although local governments always act pursuant to authority "delegated" by the states, in the sense that local governments have only such authority as the state delegates to them, see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 429 (1978) (Stewart, J., dissenting), Congress' goal of achieving statewide uniformity of pesticide use regulation is not consistent with all such "delegations" of authority, and is consistent only with specific delegations of administrative authority.

This Court is not unfamiliar with distinctions between local action that is authorized under specific state delegations of authority and local action that is not so authorized. For instance, this Court has held that although the states are immune from the federal antitrust laws, see *Parker v. Brown*, 317 U.S. 341 (1943), local governments do not have similar immunity unless they act "pursuant to state policy" or pursuant to state "command," or unless the state has "directed or authorized" the local action, or unless the State Legislature "contemplated" the local action, or unless the local government is "administer[ing] state regulatory policies." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413-416 (1978). If state policy is "neutral," or if the local government "express[es] its own preference, rather than that of the State," the local government lacks antitrust immunity. *Id.* at 414. Thus, local antitrust immunity depends on a qualitative analysis of the local action, in terms of whether it is specifically authorized and directed by state law. In our view, the congressional purposes underlying FIFRA require a similarly qualitative analysis of the local action.

Applying these principles to the instant controversy, the local ordinance in this case apparently was not adopted pursuant to a state system of pesticide use regulation that utilizes local governments for purposes of administration. Indeed, the

dissenting opinion below noted that the Wisconsin statute is "neutral as to what local governments may do," and argued that the local ordinance was valid simply because it did not "conflict" with state statutes and was otherwise adopted pursuant to state statutes authorizing local governments to exercise general powers of government. 452 N.W.2d at 568-569, & nn. 9-11 (Steinmetz, J., dissenting). None of the cited statutes authorizing local governmental action, however, directly related to pesticide use. *Id.* at 569 nn. 9-11. Thus, although the dissenting opinion characterized the Wisconsin statutory scheme as a "delegation" of legislative power to the local government, *id.* at 568, the "delegation" is simply a state authorization for local action in the face of state inaction. Under such a "delegation" of power, each city and county would have authority to adopt its own pesticide use regulation, thus creating the excessive interstate commerce impacts that Congress sought to avoid.

Although Congress precluded local governments from creating different intrastate standards, Congress did not preclude the state itself from adopting different standards for different areas within the state. To the contrary, section 24(c) of FIFRA specifically authorizes the state to register pesticides for specific uses necessary to serve "special local needs," 7 U.S.C. § 136v(c), which means that the state may authorize pesticide uses in some areas that are not authorized in other areas. In this way, Congress recognized that the states, in order to provide for comprehensive and effective regulation of pesticide use, must have authority to tailor pesticide use to special local circumstances. Thus, for example, the State of California might authorize certain pesticides for use in sparsely populated agricultural areas, such as parts of the Central Valley, but not for use in densely populated urban areas, such as the Los Angeles Basin. In enacting section 24(c), Congress made clear that the states have authority to make such differentiations, but made equally clear that such differentiations must be made at the state level rather than the local level. Congress thus intended that any diversity of pesticide uses within the state must be the product of state action, not local action.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the court below be affirmed.

Respectfully submitted,

STATE OF CALIFORNIA
DANIEL E. LUNGREN
Attorney General for State of California

STATE OF ARIZONA
GRANT WOODS
Attorney General for State of Arizona

STATE OF INDIANA
LINLEY E. PEARSON
Attorney General of State of Indiana

STATE OF MARYLAND
J. JOSEPH CURRAN, JR.
Attorney General for State of Maryland

STATE OF NEW JERSEY
ROBERT J. DEL TUFO
Attorney General for State of New Jersey

STATE OF WASHINGTON
KENNETH O. EIKENBERRY
Attorney General for State of Washington